IN THE

Supreme Court of the United States

OCTOBER TERM—1941.

No. 961.

UNITED STATES OF AMERICA,

Respondent,

vs.

HENRY GERKE, JAMES T. BROWN, GERALD R. WADE, CHARLES LARKEY, JAMES HOLLAND and JOSEPH TURANSKY,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Henry Gerke, James T. Brown, Gerald R. Wade, Charles Larkey, James Holland and Joseph Turansky, the petitioners herein, respectfully present their petition for a writ of certiorari to review the final judgment of the United States Circuit Court of Appeals for the Third Circuit, in which a decision in the above case was rendered on January 16, 1942.

Statement of the Case.

This case arises upon an indictment charging the petitioners and others with unlawfully importing and conspiring to import alcohol into the United States in violation of the Tariff Act of 1930, Section 593-b; Title 19, Section 1593, U. S. C. A., and Title 18, Section 88, U. S. C. A.

The petitioners, hereinafter referred to as the defendants, were tried before Judge Thomas Glynn Walker, and a jury in the District Court of the United States for the District of New Jersey, on May 20, 1941. Verdicts of guilty against these defendants were returned on May 29, 1941, and sentence imposed on June 9, 1941.

Defendants were tried together with Daniel W. Robin and F. W. Watson, and all were convicted. On appeal to the United States Circuit Court of Appeals, the judgments of conviction against Robin and Watson were reversed, but were affirmed as to these petitioners.

The indictment also charged an offense against Hyman Levin, Edgar Stanley Collins, Morris Slavin and William Josephs. None of the latter were tried, the defendants Edgar Stanley Collins and Hyman Levin having been granted a severance; the defendant William Josephs having died, and the defendant Morris Slavin being a fictitious person.

Indictment.

The indictment is in three counts. The first count charges all of the defendants with having unlawfully imported 50,000 gallons of alcohol into the United States on board the boat Charles D. Leffler on April 25, 1936, without the payment of duty.

The second count charges all of the defendants with having received and concealed and facilitated the transportation and concealment of 50,000 gallons of alcohol, on board the Charles D. Leffler on April 25, 1936, knowing the said alcohol to have been unlawfully imported into the United States.

The third count charges a conspiracy to unlawfully import alcohol of foreign origin into the United States, the conspiracy being accomplished by the purchase of alcohol outside the United States, the loading of such alcohol on to certain vessels on the high seas, the transfer of such

alcohol from these vessels on to contact boats, and the bringing of the alcohol into the United States for the purpose of sale therein without payment of duty. It is further charged as part of said conspiracy that the defendants chartered the vessel Hillfern; that at Antwerp, Belgium, they placed alcohol on board the Hillfern; that they purchased the vessel Charles D. Leffler; that at some point on the high seas the alcohol was transferred from the Hillfern to the Leffler, and that the Leffler then proceeded to the United States for the purpose of clandestinely transferring the alcohol to tanks on shore.

Certain definite overt acts are charged which formed the basis of the proof at the trial.

As to the defendant Gerke, the indictment charges that in 1935 at Halifax, Nova Scotia, he met and employed one Stanley Collins, who took command of the motor ship Reo 1st; that Collins, at the direction of Gerke and one Hyman Levin, conveyed alcohol from St. Pierre, Miquelon, to a point off Little Egg Inlet, New Jersey; that Gerke and the said Hyman Levin on March 28, 1936, caused alcohol to be placed on board the vessel Hillfern, at Antwerp, Belgium. These are the sole overt acts charged against the defendant Gerke.

As to the defendant James T. Brown, the indictment charges that, together with Stanley Collins, he operated the vessel Reo 1st to a certain brick yard on Raritan Bay, New Jersey, and did there unlawfully import alcohol into the United States; that on November 15, 1935, on the high seas, Brown and Collins unloaded alcohol from the vessel Anna D. Anagagana into another vessel; that on April 23, 1936, Brown and others unloaded alcohol from the vessel Hillfern into the vessel Charles D. Leffler on the high seas.

As to the defendant Charles Larkey, the indictment charges that on April 23, 1936, he and others unloaded alcohol from the Hillfern to the Charles D. Leffler on the high seas, and that on April 25, 1936, he did unlawfully import alcohol on board the Charles D. Leffler at Bayway,

New Jersey. The same overt acts are charged against the defendant James Holland.

No overt acts are charged against the remaining defendants.

Facts.

The testimony at the trial was directed toward several unrelated phases of the case. The first two counts, for instance, concern themselves only with the seizure of the vessel Charles D. Leffler at Bayway, New Jersey, on the night of April 25, 1936. At 9:45 P. M. of that date the vessel was boarded by Coast Guard Officers while it was tied up at the dock of the New York Storage & Transfer Co. at Bayway, New Jersey (App. p. 291). No one was on board the boat, but a centrifugal pump was found to be operating on the dock with a line from the boat to the pump, and another line from the pump to a main line on the property of the New York Oil Storage & Transfer Co. (App. p. 292). It was conceded at the trial that at the time of its seizure the Leffler contained alcohol, which was being pumped from its tanks.

The Leffler was a small tanker formerly used for transporting oil. It had been owned by the Standard Shipping Company and was thereafter acquired by Daniel W. Robin, and on November 9, 1935, was sold by Mr. Robin to the Economy Oil Transportation Company (Exhibit G-9, p. 669). The boat had not been in service for some two years (App. p. 116), and at the time of its sale was laid up at a shipyard in Baltimore. It required extensive repairs, some of which were made before its sale to the Economy Oil Company, and some after its sale.

The Economy Oil Transportation Company was formed by the defendant Josephs or Nielsen, as he also called himself. Nielsen, however, did not appear in the corporate picture. Sometime in the late Fall of 1935, Nielsen approached the defendant Wade, a seaman then out of

employment, told him that he was organizing an oil company and that he was going to buy a tanker, and offered Wade a job. Wade accepted, and under Nielsen's orders rented an office in New York City for the Economy Oil Company. Also at Nielsen's request Wade engaged an attorney, Murray Zazeela, to incorporate the company, Wade being designated as the company's president.

Thereafter Nielsen, this time however using the name Josephs, contacted Mr. Robin and purchased from him the Charles D. Leffler. The boat was enrolled at the Port of Wilmington in the name of the Economy Oil Transportation Company, Wade's name appearing on the enrollment certificate as president of the company (Exhibit G-10).

At or about the same time Nielsen engaged the defendant Charles Larkey, as captain of the Leffler, and ordered him to report to the boat in Baltimore. Arriving there Larkey was told by Nielsen to file the necessary papers as master in Wilmington, which he did (Exhibit G-17).

Thereafter extensive repairs were continued to be made at Baltimore, and later at the Hildebrant Shipyard on the Hudson River, at Roundout, New York. With Larkey as master the boat proceeded from Baltimore to the Hildebrant Shipyard, then back to Wilmington for inspection. It then proceeded back to the shipyard and again returned to Wilmington for inspection. On one of these trips the boat encountered a storm and ice, and was damaged and almost sunk, so that it had to be repaired temporarily at a shipyard in Dorchester, New Jersey. After its second trip to Wilmington more repairs were ordered by the steamboat inspectors, and the boat left for Hildebrant Shipyard. On the way up the Hudson it stopped at 125th Street for a short interval. Reaching Tarrytown it encountered a blinding snow storm and put in at Tarrytown. Ice, however, froze around the boat, so that it was forced to remain at this point. Larkey thereupon quit the boat and sought other employment, but was told by

Nielsen that they would get in touch with him when the ice broke up.

While the boat was in the ice at Tarrytown, Nielsen communicated with the defendant James Holland, a marine engineer, who lived in Arkansas, and who had done work at the Hildebrant Shipyard, who recommended him to Nielsen. After correspondence, Holland agreed to make certain repairs to the boat, and accordingly boarded the boat at Tarrytown. It remained there for some weeks until the ice broke up, and then proceeded to the Hildebrant Shipyard, where the repairs were completed sometime in April, 1936. The repairs completed, Holland was told that he would have to wait for his money until after a trial run had been made. Holland accompanied the boat on this trial run as far as Tarrytown where he left it. He then proceeded to New York City, where he remained for several days, awaiting Nielsen's return so that he could be paid and return home. The Leffler proceeded to Wilmington under the captaincy of Larkey, who had rejoined the boat. At Wilmington Larkey found no one from the Economy Oil Company awaiting him, and left the boat and proceeded to get drunk. He did not return to the boat until the following day and when he did, he noticed that the boat was loaded, and had been turned in a different direction since he left it. Going on board, he was greeted by a new Captain, who told Larkey that he had been hired in his place and that Larkey's services were no longer required, and that Larkey would be paid in New York if he would report to the Economy Oil offices. Larkey was told that the boat was proceeding to Bayway, in Elizabeth, and he asked whether the new captain would return him there, since he had no other means of reaching New York. The boat did proceed to Bayway, Larkey accompanying it. It reached Bayway on the evening of April 25th.

At about 7:30 P. M. of that evening, Nielsen got in touch with Holland in New York City, told him the boat was at Bayway and that they had had considerable trouble with

the engine and asked him whether he would come to the boat and look it over. Holland agreed and was driven to Bayway by Nielsen. Reaching there, he boarded the boat, meeting Captain Larkey on board. He examined the engines, and changing into old clothes, he repaired them in about fifteen minutes time. This done, Nielsen informed him that the steering cable had been chafed and needed replacement. After some discussion Nielsen and Gray, the new captain, left for New York to obtain a new cable, telling Holland and Larkey to await their return, so that Holland could repair the cable. Nielsen said that when this was done, he would drive them both to New York and pay Holland off, so that he could return to Arkansas.

The dock at which the Leffler was tied up at Bayway had been leased from the New York Oil Storage & Transportation Company by Nielsen and a man named Ferber, who also appears to have been identified with the Economy Oil Company. The lease was made in the name of M. J. Slavin, trading as Criterion Oil Company. All of the negotiations for this lease were conducted by Ferber, but when the time for its execution arrived Nielsen told the defendant Wade to sign it in the name of M. J. Slavin, trading as Criterion Oil Company, which Wade admittedly did. Slavin apparently was a non-existent person.

Sometime around nine o'clock on the evening of April 25th, Coast Guard Officers arrived at Bayway from the water and boarded the boat. They found no one there, Larkey and Holland having left the premises and having gone to a saloon to await Nielsen's return. They did, however, find a centrifugal pump on the property of the New York Oil Storage & Transfer Company, pumping alcohol from the Leffler. While they were there the defendant Turansky approached to see the cause of the disturbance. Turansky at no time was on the property of the Criterion Oil Company, nor did he appear to have any connection with the Leffler. When challenged in the darkness by the Coast Guard, he informed them that he was a watchman,

and was promptly arrested. Holland and Larkey, returning to the dock at about 12:30 A. M., were met by the Coast Guardsman and also arrested. Nielsen and Gray did not return to the boat.

The defendant, Nielsen, styled in the indictment as William Josephs, died before the trial. The defendant Ferber, or Hyman Levin, was not tried.

So much of the testimony concerns the Charles D. Leffler.

The indictment also charges, in the third or conspiracy count, a general scheme on the part of all of the defendants whereby they were supposed to have chartered the S. S. Hillfern, at Antwerp, Belgium; that the Hillfern transported alcohol to some point on the high seas where the alcohol was transferred to the Leffler, and that the Leffler then took the alcohol into the United States unlawfully. This charge in the indictment was not proved by any evidence in the case. It was shown that the Hillfern was chartered by a legitimate distillery in Belgium to transport alcohol to Uruguay (Exhibits G-21 and G-22). There is no proof however as to who chartered the Hillfern, or that any of the defendants had any connection with it. Neither is there any proof that it ever met the Leffler as charged, or that alcohol was transferred from the Hillfern to the Leffler.

The indictment also charges that alcohol was introduced from other vessels named in the indictment, by means of small contact boats. So the evidence shows that the boat "Reo 1st" sailed under the direction of Captain Stanley Collins, (who was not on trial), from St. Pierre, where it took on a cargo of alcohol, to a point off Barnegat Light, where it discharged its cargo on to small boats. It then contacted the vessel "Accuracy" on the high seas, and took on more alcohol. From there it proceeded to Raritan Bay, where the cargo was landed into trucks which were waiting there. The witness Cunningham, who was one of the sailors on the Reo, testified that the defendant Brown

boarded the Reo at the mouth of Raritan Bay and piloted it to its landing place.

Cunningham also testified that he shipped with Collins on the boat "Augusta and Raymond" in 1935 from Yarmouth to a point off New York, where the cargo was discharged into small boats. Again he shipped with Collins in 1935 on the boat Anna D. Anagagana from St. Pierre to a point off Hog Island Light, where it discharged its cargo on to the Charles D. Leffler.

Questions Presented.

I. Whether the trial court erred in refusing to direct a verdict of acquittal as to all defendants on the third count of the indictment on the ground that the conspiracy charged was not proved.

II. Whether the trial court erred in refusing to direct a verdict of acquittal as to the defendant Henry Gerke.

III. Whether the trial court erred in refusing to direct a verdict of acquittal as to the defendant Joseph Turansky.

IV. Whether the trial court erred in refusing to direct a verdict of acquittal as to the defendant James Holland.

V. Whether the trial court erred in refusing to direct a verdict of acquittal as to the defendant Charles Larkey.

VI. Whether the trial court erred in refusing to direct a verdict of acquittal as to the defendant James T. Brown.

VII. Whether the trial court erred in refusing to direct a verdict of acquittal as to the defendant Gerald R. Wade.

VIII. Whether the Circuit Court of Appeals for the Third Circuit erred in affirming the judgments of conviction herein.

Reasons for the Petition.

The reasons for which this petition is presented are:

That the Circuit Court of Appeals for the Third Circuit has rendered a decision contrary to the greater weight of the evidence in the case; that it has decided an important question of general law in a way untenable and in conflict with the universal weight of authority; that insofar as the petitioner Henry Gerke is concerned, that the Circuit Court of Appeals has decided an important question of general law in a way untenable and in conflict with the universal weight of authority in holding that the mere presence of this defendant at the scene of the crime, or at places where some activities in connection with the general conspiracy were consummated, was sufficient evidence upon which to base an inference of guilt as to said defendant; that it has rendered nugatory the principle that where two hypotheses exist, one consistent with defendant's innocence and the other with his guilt, that hypotheses should be adopted which is consistent with defendant's innocence, and that the defendant is entitled to the presumption of innocence under such circumstances.

Wherefore your petitioners respectfully pray that a writ of certiorari issue to the Circuit Court of Appeals for the Third Circuit to review the judgment of said court, and petitioners submit their brief hereto attached in support of their petition.

Respectfully submitted,

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SAMUEL I. KESSLER,
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UNITED STATES OF AMERICA,

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VS.

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Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the United States Circuit Court of Appeals for the Third Circuit in this matter was filed on January 16, 1942. It has not as yet been officially published, nor has it appeared in the advance sheets. A certified copy of said opinion is attached to and made a part of the record used in the court below, which record, completed as required by the rules, has been filed with this court.

II.

Statement of the Case.

All of the facts of the case have been set forth under the statement of facts contained in the petition for the writ of certiorari which precedes this brief. Rather then repeat them here and burden the record we beg leave to refer to that outline of the case. The particular facts pertinent to each defendant are discussed under the arguments relating to those defendants.

POINT I.

The court erred in refusing to direct a verdict of acquittal as to the defendant Henry Gerke.

The defendant Gerke is mentioned in only three of the overt acts set forth in the indictment. It is our respectful contention that none of these overt acts was proven by the government, nor is there any proof in the entire case relating to Gerke, from which any inference of guilt can be drawn on any of the counts of the indictment.

Referring to the overt acts in which this defendant is mentioned, it is first charged that Gerke met with and employed Stanley Collins, to take command of the vessel Reo 1st. The record is barren of any testimony, or suggestion of proof, to sustain this charge. Second, it is alleged that Collins conveyed alcohol from St. Pierre to Little Egg Inlet at the "direction" of Gerke and Hyman Levin. Again the record is barren of any proof to sustain this charge. There is testimony from which it can be inferred that Collins (who was not produced and has not been tried) was in command of the Reo 1st. But there is no proof or suggestion of proof as to who hired him, how he was hired, for whom he acted, or that he acted for any one but himself.

Third, it is charged that Gerke and Levin caused alcohol to be placed on board the Hillfern, at Antwerp, in 1936. Here again there is no proof to sustain the charge, as we shall point out.

The testimony relating to Gerke is not extensive, and a reference to all of it will demonstrate that it falls far short of proving any guilt on his part, under any count of this indictment.

First, the witness Cunningham testified that in February 1935 he saw Gerke at Yarmouth, Nova Scotia, standing on the docks in that city, talking to Collins and Hyman Levin (App. p. 28). He heard none of their conversation

and, as a matter of fact, never met Gerke, never spoke to him or said a word to him (App. p. 39). Gerke did not come aboard the boat (App. p. 40), and this is the total testimony relating to this incident.

Cunningham further testified that he again saw Gerke in May 1935 standing on the Standard Oil Company dock at Halifax. Again there was no conversation between them, nor does he indicate that Gerke was with any one else at the time (App. p. 41). He saw Gerke a third time in November 1935 at Yarmouth—"in the town"—"just seen him there, that's all" (App. p. 42).

Cunningham further testified that he "thought he saw" Gerke come aboard the Reo 1st, when it was tied to a dock in the Raritan River on February 20, 1935, (App. p. 45). He said that it was dark at the time, there being no lights on the dock, that he didn't speak to the man whom he thought was Gerke, and when pressed, he admitted that he was not at all sure that it was Gerke whom he saw (App. p. 47). It is evident that this testimony is without any weight whatsoever.

In addition to Cunningham's testimony, the witness Emile Heyrman testified that in March 1936 he was engaged in business as a maritime broker in Antwerp, Belgium. During that month Mr. Heyrman's company, at the solicitation of the Meeus Distillery of Belgium, took over the agency of a shipment of alcohol which the Meeus Company was making on the vessel Hillfern (App. p. 232). During the loading of this boat Mr. Heyrman out of curiosity went to the quay (App. p. 260), and there met several people, including Mr. Meeus, a Mr. Mosses, and a Mr. Stanley, whom the witness identified as Gerke (App. p. 237). The men were all standing in a circle chatting and Mr. Stanley (or Gerke) was talking to Mr. Mosses. Heyrman had no conversation with him then, or at any other time, other than a few mumbled words of greeting (App. p. 261). After a few moments they all went on board the Hillfern with the exception of Gerke, who did not go on board the

boat (App. p. 261). Heyrman did not thereafter see Gerke until the time of trial.

Passing the matter of his identification of Gerke as the Mr. "Stanley" whom he met in Antwerp, which identification was by no means positive (App. pp. 237, 263, 265), the testimony of Heyrman proves no more than the fact that Gerke was on a pier in Antwerp talking to other people in 1936. What he was talking about, what he was doing there, is not shown. It does not appear that he had any connection whatsoever with the Hillfern. So far as the testimony in the case indicates, his presence there was far more consistent with innocence, and free from connection with this case, than was the witness Heyrman's own presence there.

Only one other witness in the case testified concerning Gerke, and that was Oda Papathanos. This woman was apparently a friend of Stanley Collins and lived in Nova Scotia. She testified that she met Gerke at the Nova Scotian Hotel, in Halifax, in 1935, in company with some other man (App. p. 285). She again met Gerke at the St. George Hotel, in Brooklyn, in 1936, just after Gerke had come back from Europe (App. p. 285), and on this occasion she says Gerke gave her $100.00 which was owing to her from Stanley Collins and which Gerke had brought to her from Collins, who was in England (App. p. 285).

That is the sum total of all the testimony relating to Gerke in the entire case. In all of this there appears not one shred of evidence tending to prove any connection between Gerke and the Charles D. Leffler, or with the events of April 25, 1936, which formed the basis of the first and second counts of the indictment.

The first two counts it will be noted deal exclusively with the seizure of the Leffler at Bayway, New Jersey, on April 25, 1936.

The facts relating to the seizure of the Leffler are set forth in the state of facts which prefaces this brief. Nowhere in all of the testimony is there any reference to

Gerke in connection with this boat. He is not shown to have had any connection with its purchase, its operation or repair, or its ownership. He was not present at any of the places where this boat was located by any of the witnesses. He was not present at Bayway when it was seized and no proof is offered that he knew any of the defendants who were on trial, or had any dealings with them.

Under the circumstances, and in view of the utter absence of proof to establish his guilt under the first and second counts, we submit that there was no evidence warranting the court in submitting the question of his guilt under these counts to the jury, and it is therefore our respectful contention that the court erred in refusing to direct a verdict of acquittal on these counts.

Neither is there any proof to establish his guilt under the third count, which charges the conspiracy. As we have pointed out, no agreement, no corrupt combination, or concert of action, was proved to exist between Gerke and the remaining defendants on trial. There is no proof that he ever met any of them, talked to them or even knew them. The overt acts which the indictment alleges were committed by this defendant, are not sustained by any evidence at all.

Taking the testimony in its most unfavorable light towards this defendant the proof is, at most, that Gerke was seen by Cunningham in Yarmouth, in Halifax, and again in Yarmouth. He was seen by the witness Heyrman in Antwerp. He acted as a messenger to deliver some money to the witness Papathanos. All of these acts are wholly consistent with innocence, and no more is shown in the entire record. For instance, on the three occasions when Cunningham says he saw Gerke at Yarmouth and Halifax, there is no proof that any illegal act was being committed in Yarmouth and Halifax at the times in question by any of the defendants. There is no proof that anything occurred in those cities, which it could be inferred was a part of the conspiracy. Likewise, there is no proof

whatsoever that anything occurred in Antwerp, at the time that Gerke was supposed to be there, of an illegal nature or which might be considered to be a part of this conspiracy. The sole evidence concerning the happenings in Antwerp is that the Hillfern was chartered by a legitimate distillery in Belgium to transport alcohol to Uruguay (see Exhibits G-21 and G-22, App. p. 671). This is a wholly legitimate act, since it was certainly not against the law to ship alcohol from Belgium to Uruguay, so that even if Gerke could be assumed to have had any connection with the shipment of this alcohol there is still no proof that it was in furtherance of any illegal act, or in furtherance of the conspiracy which is charged. There is no testimony anywhere in the case that any of the alcohol shipped into this country, came from the Hillfern, or that the Hillfern made any contact with any of the other boats named in the indictment. Even if we supply that which the evidence does not, and assume that Gerke had some business in Antwerp connected with the Hillfern, his participation there could not be considered any more guilty or illegal than Heyrman's participation, or that of Meeus or any of the others. But we again repeat that the evidence does not go that far. All that is shown is that he was talking to some people on the pier; that he did not even go on board the Hillfern; and that is all.

Likewise, his appearances in Yarmouth and Halifax were perfectly legitimate, since even if it be assumed that he was engaged in any activity there, it must be remembered that the shipment of alcohol or liquor in that country was not illegal.

Neither can any inference be drawn from the fact that he delivered some money to Mrs. Papathanos. The mere fact that he knew Collins, the mere fact that he may have been very friendly with Collins, does not indicate any complicity on Gerke's part.

Gerke had just returned from England. Collins was in England and was and still is an officer in the British Navy.

There is nothing in Gerke's conversation with Mrs. Papathanos that is indicative of any guilt, and it certainly does not indicate any conspiracy or corrupt agreement.

The Circuit Court of Appeals in affirming the judgment of conviction against Gerke said "it is difficult to conceive that merely a succession of coincidences was responsible for Gerke's presence" in the various places referred to, and that "the only credible explanation" of his activities is that he was directly concerned in the purchase and transportation of this alcohol.

We submit that this reasoning disregards entirely the evidence and is a conclusion which is not based on any evidence in the case. It disregards entirely the presumption of innocence existing in favor of the defendant. It disregards entirely the fact that no criminal activities were proved to have been engaged in at any of the places where Gerke was seen. The court in urging this conclusion, has based an inference upon an inference, which is not permissible, and has disregarded the well settled authority throughout the country.

It is well settled that mere presence at the scene of a crime is no indication of guilt, standing alone. In the case at bar, so far as Gerke is concerned, it is not even shown that he was present at the scene of any crime, for the evidence does not indicate in any degree that any part of this conspiracy was executed or consummated at the places where Gerke was seen.

We refer to the case of *Brauer* vs. *U. S.* (C. C. A. N. J.), 299 Fed. 10, decided in this Circuit, which involved a prosecution for a conspiracy to manufacture and sell distilled spirits and the maintenance of a nuisance. There was evidence that certain of the defendants, who were detectives, were present from time to time in the garage in which it was claimed that the remaining defendants manufactured liquor illegally. There was no further evidence that they did anything in the conspiracy, or in its furtherance, and the court held that this was insufficient

proof to warrant the conviction of the defendants. We quote from the opinion:

> "We are also of the opinion that the motion for a directed verdict as to Boldt and Flannery should have been granted * * *. These defendants were plain clothesmen on the detective force of Jersey City. As to Boldt the only testimony implicating him in the alleged conspiracy, or in the maintenance of a nuisance, was his presence from time to time in a garage where it is alleged the defendants made distilled spirits. There is nothing to show that he said or did anything, either in the formation of the conspiracy or in its furtherance. His presence there may or may not have been in the line of duty. However that may be it alone is not enough to sustain an inference of guilt."

We point out that in the case cited the defendants were actually at the very scene where the crime was being committed, which is not the proof in the case at bar. Certainly, in view of this ruling by this very Circuit, it cannot be said that the evidence against Gerke was sufficient to warrant its submission to the jury. The evidence falls far short of proving defendant's guilt, or of excluding every reasonable hypothesis of innocence.

> "Though the offense of conspiracy may be established by circumstantial evidence, the circumstances must be of such a character as to exclude every reasonable hypothesis but that of defendant's guilt of the offense charged". *U. S.* vs. *Richards,* 149 Fed. 443.

It would seem to be elementary that in order for a conviction for conspiracy to be sustained there must be some proof of the conspiracy—some evidence of agreement be-

tween the defendant and those with whom he is alleged to have conspired. Indeed our courts have gone further than this and require something more than mere association with those charged in the conspiracy. The defendant, in order to be considered an accomplice, an aider or abbetor, or a conspirator, must be shown to have affirmatively united himself with the venture and agreed to take some part in it. He must in some sense promote the venture himself, make it his own, have a stake in its outcome.

U. S. vs. *Falcone*, 109 Fed. 2d. 579;
U. S. vs. *Staffenbach*, 61 Fed. 2d. 955;
U. S. vs. *Dellaro*, 99 Fed. 2d. 781;
U. S. vs. *Devito*, 68 Fed. 2d. 837.

As was stated in *Shaunabarger* vs. *U. S.*, 99 Fed. 2d. 957:

> "Where the government relies upon circumstantial evidence to establish a conspiracy the circumstances must be such as to warrant the jury in finding that the conspirators had some unity of purpose, some common design and undertaking, and some meeting of minds in some unlawful arrangement and do some overt act to effect its object".

Where is the proof from which any such agreement can be inferred, insofar as Gerke is concerned? Certainly it cannot be spelled out from the mere fact that Gerke talked to Collins, knew Collins, or that he was seen—just seen and nothing more—in Antwerp, Yarmouth and Halifax. It might as well have been proved that he was seen in a dozen other cities. Such proof establishes nothing.

What part Gerke is supposed to have played in this conspiracy, and by what theory the government contends he was a part of the conspiracy, is most certainly obscure from the evidence in this case. What the government *desired* to prove, we know from the indictment. But a mere

charge in the indictment cannot be made the substitute for legal evidence. Those things which the government specifically charged against Gerke, it wholly failed to prove. There is no testimony in the entire case from which any inference can be drawn that Gerke was a part of this conspiracy, that he did anything to further its execution, that he was in any manner identified with the other defendants in this venture, or that he even knew of the existence of the Charles D. Leffler.

We therefore submit that the court erred in refusing to direct a verdict of acquittal as to this defendant, and that such refusal constitutes error requiring a reversal.

For the reasons submitted, we respectfully urge that the judgment of conviction entered against this defendant be reversed and set aside.

POINT II.

The Court erred in refusing to direct a verdict of acquittal as to all defendants on the third count, on the ground that the conspiracy charged was not proved.

The third count of the indictment recites at some length a definite and detailed conspiracy on the part of all defendants to unlawfully import alcohol into the United States by means of certain specific acts pleaded in the indictment; and the accomplishment of that conspiracy through the commission of other overt acts also pleaded.

Thus it is charged "as part and parcel" of the conspiracy to unlawfully import alcohol, that the defendants would purchase large quantities of alcohol outside the United States; that they would load this alcohol onto certain named vessels at points on the high seas; that they would cause these vessels to proceed to places off the shores of New York and New Jersey; that they would arrange for the hire and use of contact boats; that they

would cause these boats to meet the others on the high seas, and then cause the contact boats to proceed into the United States after receiving alcohol, without the payment of duty. Also, as "part and parcel" of the conspiracy, that they would hire the vessel "Hillfern"; that they would place tanks on the Hillfern; that they would similarly purchase the Leffler and place tanks on that boat; that at Antwerp they would purchase large quantities of alcohol; that they would place this aboard the Hillfern; that they would cause the Hillfern to meet the Leffler on the high seas; that they would transfer the cargo from the Hillfern to the Leffler; and that the Leffler would then proceed into the United States with its cargo, without paying duty.

All of the foregoing is the conspiracy charged. The overt acts are additional to the recital above.

Under this indictment, it was the burden of the government to establish the particular conspiracy there pleaded (*U. S.* vs. *Jacobson*, 34 Fed. Supp. 210). Proof of a different conspiracy or proof of other disconnected conspiracies, will not sustain a conviction (*U. S.* vs. *Beck*, 118 Fed. 2nd 178).

It is our respectful contention that the Government wholly failed to establish the conspiracy charged, and failed to sustain the charges made in this indictment.

Taking each of the elements of the conspiracy, as they are pleaded in the indictment, in order, it is evident that the proof wholly failed to conform to the charge.

1. *That the defendants would purchase and procure large quantities of alcohol at places without the United States.* There is not one scrap of evidence that the defendants or anyone else purchased any alcohol, either within or without the United States. Neither can it be inferred, from any evidence in the case, that any alcohol was purchased by any of the defendants in this indictment.

2. *That they would cause this alcohol to be loaded onto vessels known as the Reo 1st, Augusta & Raymond, Frederick H. 2nd, Anna D. Anagagana, and others whose names are not known.* Here again there is no proof whatsoever to substantiate the charge made. The sole proof is that the defendant Collins, who was not on trial, acted as captain of the Reo 1st, Anna D., and Augusta and Raymond, in sailing from certain Canadian ports, to points off the United States. But there is no proof that these boats were loaded with alcohol by any of the defendants, or at their instigation, or with their knowledge. Where the alcohol came from is not shown. Neither is it shown that Collins was acting with anyone else or for anyone else, other than himself. The particular charge recited is not supported by any evidence.

3. *That the defendants would cause the vessels named to proceed to points off the coast of New Jersey and New York, there to await the arrival of contact boats.* There is no evidence that any of the defendants had anything to do with the boats whose names are given above. The ownership of these boats is not proven. At whose direction they sailed, at whose orders they went where they did, is not shown. All that appears is that Collins was captain. There is nothing from which it can be inferred that the defendants "caused" these boats to proceed as they did.

4. *That the defendants should procure and arrange for the use of contact boats, and cause them to meet the other boats at sea, where the alcohol would be transferred to the contact boats and brought into the United States.* The sole evidence as to contact boats is given by the witness Cunningham, who testified that he was on the Reo 1st in January, 1935; that Collins was its captain; that it proceeded from St. Pierre in the Miquelon Islands, to a point off Barnegat Light, where it was met by garveys, or contact boats, some of which took alcohol from the Reo. Cunningham further said that he saw the defendant Brown in one

of these boats. Aside from this statement, there is no evidence in the entire case that any of the defendants "procured or arranged for" contact boats; or "caused them to meet" the other boats at sea. There is no evidence at all, that the contact boats proceeded into the United States, or that if they did, that they failed to pay duty. While it may well be inferred what these boats were doing, the inference to be drawn is not a legal inference, based upon proof. It is not shown that these boats were in fact engaged in any illegal venture, or in the execution of the conspiracy charged, and whatever the surmise, we cannot substitute conjecture for proof. Most certainly, it is not shown that the defendants were in any way connected with the hiring or the operation of these boats, nor is this charge in the indictment sustained. Even if it be assumed that Brown and Collins at the time were engaged in an illegal act, it is not shown that it was the result of any conspiracy, or that their substantive crime was committed with the knowledge or consent of the remaining defendants, either express or implied.

5. *That the defendants should hire and charter the vessel Hillfern.* There is no proof as to this charge. The sole proof as to the Hillfern, introduced by the government, is that it was chartered by a legitimate distillery in Belgium, to transport alcohol to Uruguay. None of the defendants is shown to have had any connection with the Hillfern.

6. *That the defendants should place on the Hillfern tanks suitable for the transportation of alcohol.* There is utterly no proof of this charge, or that tanks were ever placed on the Hillfern by anyone.

7. *That the defendants should purchase large quantities of alcohol and put the alcohol on board the Hillfern at Antwerp.* There is again no proof of this charge. By the government's own proof, the alcohol was not placed on the Hillfern by the defendants.

8. *That the Hillfern should proceed to meet the Leffler on the high seas, and transfer its alcohol to the Leffler.* This was definitely not proven by any evidence, although it would seem to be the most vital link in the chain of proof relied upon by the government. There is no evidence that the Hillfern proceeded anywhere from Antwerp, or that the alcohol aboard it went anywhere but Uruguay. There is no proof that the two boats ever met on the high seas or anywhere else, as charged. There is no proof that the Leffler ever received alcohol from the Hillfern. This charge is wholly unsubstantiated.

There is also a failure of proof as to the overt acts alleged to have been committed pursuant to and in execution of the conspiracy.

The first overt act, that the defendant Gerke met and employed Collins to take command of the Reo, was not proved, nor attempted to be proved.

The second, that Collins carried alcohol from St. Pierre to Little Egg Inlet, "at the direction of Gerke and Levine", also was not proved. Collins did carry the alcohol, but not at Gerke's or Levine's direction, or any one's else, insofar as the evidence shows.

The third charges that Collins, with Brown, brought alcohol up the Raritan River on the Reo 1st.

The fourth charges Collins alone with taking alcohol aboard the Augusta and Raymond off St. Pierre.

The fifth charges Collins with unloading alcohol from the Anna D. to an unknown vessel, off Hog Island. Brown is also charged in this act, but there is no evidence that Brown took any part in this alleged act.

The sixth, that Gerke and Levine, at Antwerp, placed alcohol aboard the Hillfern, is not proven.

The seventh, that Collins, Larkey, Holland, and Brown, transferred alcohol from the Hillfern to the Leffler on the high seas, was not proven, as we have pointed out above.

The seventh, that Larkey and Holland brought alcohol into Bayway illegally on April 25th, 1936, is a repetition

of the first and second counts, or the charge therein set forth. However, neither Larkey or Brown is shown to have brought this boat into Bayway, or to have had anything to do with the unlawful importation of alcohol on the Leffler on the night in question.

What is there left of the charge made in the indictment? A series of disconnected acts committed by the defendant Collins, who was not on trial, and which are not shown to have been committed as part of any agreement or conspiracy on the part of the defendants.

All that is left of the conspiracy charged is that Collins in January, 1935, sailed alcohol from St. Pierre to Barnegat; that later Collins sailed up the Raritan River and discharged alcohol, it being added that Brown piloted him; that in May, 1935 Collins sailed another boat from Yarmouth to a point off New York; and in November 1935, that Collins sailed once more to a point off Hog Island; that the Leffler was purchased by Nielsen (Josephs) and Ferber (Levine); that the Leffler was seized in April 1936, with no one aboard. These are all unrelated acts, each of them a substantive crime in itself, if anything. The only manner by which all of the defendants could be charged with guilt of these crimes, or overt acts, is through proof of the specific conspiracy charged in the indictment. It was incumbent upon the government to prove that these acts were committed as part of the general conspiracy charged, and this it did not do, as we have shown.

The defendants named in this indictment cannot be made liable criminally for acts performed or committed by Collins, when the conspiracy under which those acts are alleged to have been committed, was wholly failed to be proved.

There is here not even a substantial proving of the conspiracy charged, and in this connection we point out that it is the corrupt agreement charged against them, for which the defendants are being tried. They are not charged with the substantive crimes of bringing in alcohol at isolated

instances, but with conspiring and agreeing to do all of the things charged against them in this indictment. The theory of the government's case was that all of these defendants entered into a general plan or conspiracy starting in Antwerp and in Canada; that they there bought alcohol, and placed it on certain ships which they hired; that they bought other ships to which they transferred the alcohol; that they arranged for these ships to meet on the high seas; that they then brought in the alcohol on the latter ships. The difficulty is that none of this general plan or conspiracy was proved. The defendants are not shown to have conspired as they are charged. They are not shown to have committed the acts charged against them in execution of this conspiracy. They are being convicted of substantive crimes committed by others named in the indictment, but who were not on trial, and of crimes and criminal acts which were not part of any conspiracy charged in this indictment.

We respectfully submit that there was a total failure on the part of the government to prove the conspiracy set forth in the indictment, and that a verdict of acquittal should have been directed as to all of the defendants on trial in this case, on the third count of the indictment.

POINT III.

The court erred in refusing defendant's motion for a dismissal of the indictment, and in refusing to direct a verdict of acquittal in behalf of the defendant, Joseph Turansky.

Only one witness in the entire case mentions the defendant, Turansky, in connection with this case, and that is the witness Conroy. Conroy was one of a party of Coast Guardsmen who, on the night of April 25, 1936, boarded the boat Charles D. Leffler at Bayway, after approaching the Leffler from the water in their own patrol boat (App.

p. 291). Finding no one on board they went upon the dock to which the boat was tied. This dock was leased by the Criterion Oil Company. From there they proceeded to the adjacent premises of the New York Oil Storage & Transfer Company, where they found the centrifugal pump (App. p. 292). The latter corporation it will be noted is not charged with any complicity in this case.

The night was dark and there were no lights on the dock. The Coast Guardsmen (there were five of them) were not in uniform, but wore overalls over which they had on navy pea jackets with the arms cut out (App. p. 299). They used no flashlights, Conroy keeping his light in his pocket (App. p. 299).

About five minutes later, according to Conroy, a man approached in the darkness.

> "He approached me and challenged me and wanted to know who we were. I answered, 'who are you'? He said, 'Who are you fellows, Coast Guardsmen'? I answered, 'yes'. I said, 'who are you'? He said, 'I am the watchman'. With that one of my men, Kershaw, returned from the centrifugal pump with the odor of alcohol on his hands and said, 'we have got the stuff, Pete' " (App. p. 293).

This all took place some distance away from the centrifugal pump and on the property of the New York Oil Storage & Transfer Company. The watchman, Turansky, then said, "come on up to the office, so that we can talk this thing over" (App. p. 300). With that Conroy grabbed Turansky by the lapel of the coat and said, "no, I am placing you under arrest". As he grabbed Turansky, Turansky attempted to free himself from Conroy's grip whereupon Conroy struck him with his fist with sufficient force to break a bone in his finger.

That is the whole testimony concerning Turansky. From it only one evidential fact appears—that Turansky

was a night watchman on premises owned by the New York Oil Storage & Transfer Company. There is no suggestion of proof that he was employed by the Criterion Oil Company. It does not appear that he had any connection whatsoever with the Leffler, or that he knew its contents, or that he even suspected that it was engaged in any illicit venture. There is no suggestion of proof that he knew any of the other defendants, or that he ever met them, much less that he in any manner conspired with them or associated himself in the conspiracy charged against them.

On the contrary the sole testimony concerning him is that he was legitimately employed by a legitimate concern, and that he very properly investigated the cause of the disturbance on the premises which he was watching. We fail to see by what stretch of the imagination this defendant was charged with complicity in this conspiracy, nor by what logic this evidence was submitted to a jury. The evidence, we submit, fails utterly to support any inference of guilt or guilty knowledge, nor does it exclude every reasonable hypothesis of innocence. On the contrary it clearly establishes the innocence of this defendant.

We point out that the defendant Turansky rested his case at the conclusion of the government's testimony.

The government's attorney, in resisting the motion of a direction for acquittal, made much of the fact that Turansky "resisted arrest" and that from this, guilty knowledge can be implied. Such an assumption however is wholly contrary to logic, or to the evidence in this case.

Consider the facts. Here is a lonely wharf on a pitch dark night with no one about. The watchman is in his lighted office some distance away from the dock. He hears or sees a group of men on the dock and investigates, as it is his business to do. When he arrives he sees before him a motley group of roughly dressed men. He calls out to them but receives only the answer, "Who are you?" Even

if he asked, as Conroy testified, "Are you Coast Guardsmen?" which we submit was a highly unlikely question for him to have asked, he has no good reason to believe that they are. They are not in uniform, they show no badge or evidence of authority, and their only conversation is: "I've got the stuff, Pete".

If Turansky was guilty he never would have approached these men and asked, "Are you Coast Guardsmen?" If he thought that they were he could have left and escaped from them, for they had not seen him. It must be remembered that they did not find him—he walked up to them.

We submit that Turansky had every reason to be suspicious of these men and of their purpose there, and further that he may well have been fearful of violence at their hands, as would any other watchman under similar circumstances. His statement to them to come up to the office, where it was light, was what any other prudent man would have done under the circumstances. And when he was forcibly grabbed by the coat, his most natural reaction would be to pull away. Certainly it is not fair to characterize this conduct as "resisting arrest", when he had no reason to believe that he was being legally arrested. Conroy says that he held his badge in his right hand while grabbing Turansky, but even Conroy admits that he doesn't know whether Turansky could have seen it. It is apparent from the evidence that it would have been a physical impossibility for any one to have seen a badge held in Conroy's hand in the darkness, and while he was grabbing for and scuffling with Turansky.

Even if Turansky did resist arrest his conduct in so doing would have been the normal reaction of an innocent man, rather than one with guilty knowledge. He knew no reason for his arrest and he was perfectly justified in wanting to go up to the office, where it was light and he could see his captors, to find out why he was being arrested. It must be remembered that there is no testimony

that he tried to run away, but only that he sought to free himself from Conroy's clutches, for which effort he was gratuitously struck down.

We repeat that no guilty inference can be drawn from Turansky's conduct on this night. All that appears from the evidence is that he was a watchman on property of the New York Oil Storage & Transfer Company, and that he was arrested on their property and not on the property where the Leffler was located. The government has failed to sustain the burden not only of proving defendant's guilt, but of excluding every reasonable hypothesis of innocence. We refer to the case of *Brauer* vs. *U. S.*, (C. C. A. N. J.) 299 Fed. 10, cited in the brief submitted herewith in behalf of the defendant Henry Gerke, and which holds that mere presence even at the scene of the crime is not sufficient to sustain an inference of guilt, where there is nothing to show that the defendant said or did anything either in the formation of the conspiracy, or in its furtherance. Turansky was not even shown to be at the scene of the crime, but was at all times on property adjacent to that where the Leffler was docked.

As was stated in *U. S.* vs. *Heitler*, 274 Fed. 401, the evidence must convince the jury that the defendant did something more than participate in the substantive offense which was the object of the conspiracy.

And it is the well settled rule expressed in *U. S.* vs. *Richards*, 149 Fed. 443, that although the offense of conspiracy may be established by circumstantial evidence, the circumstances must be of such a character as to exclude every reasonable hypothesis but that of the defendant's guilt of the offense charged.

In affirming the judgment against Turansky the Circuit Court of Appeals has assumed that he was employed by the Criterion Oil Company as a watchman, although there is no evidence in the entire case to support such an assumption. Yet if we take away that assumption there is

nothing left from which the conviction against Turansky can be sustained.

We submit that the Circuit Court of Appeals in effect has disregarded the well settled law on this subject, has stripped from the defendant his presumption of innocence, and has justified its finding on inferences which are unsupported by any evidence.

We respectfully submit that there is no evidence justifying the submission to the jury of the question of defendant's guilt or innocence, and that the government failed to sustain its burden of proving defendant's guilt beyond a reasonable doubt.

For the reasons submitted, we respectfully urge that the court erred in refusing to dismiss the indictment against this defendant, and in refusing to direct a verdict of acquittal, and we submit that the judgment of conviction should be reversed and set aside.

POINT IV.

The court erred in refusing to direct a verdict of acquittal in behalf of the defendant James Holland.

The defendant Holland is a marine engineer, residing in Paragould, Arkansas (App. p. 519). During the period from 1929 to 1935 he had done a great deal of marine installation and repair and service work on Deisel engines at the Hildebrant Shipyard, at Roundout, New York, (App. p. 520). He was fully equipped to perform such work, and owned his own tools and specialized equipment, (App. p. 520).

On or about the first of February 1936, he received a letter from the Economy Oil Company telling him that they had a boat (the Leffler), which at that time was frozen in the ice at Tarrytown, New York, upon which they desired certain repairs to be made; that Holland had

been recommended to them by the Hildebrant Shipyard as being capable of performing the work; and asking him whether he would undertake the job. He replied to this letter and agreed to come to New York to make a preliminary survey if his transportation would be paid. The Economy Company agreed to pay his transportation and he came to New York (App. p. 521).

Upon his arrival, he met Mr. Nielsen, who drove him to Tarrytown where the boat was in the ice. He went on board with Nielsen, inspected the work and entered into an agreement to make the repairs for the sum of $750.00, payment to be made at the rate of $100.00 per month, the balance to be paid when the repairs were finished to the satisfaction of Nielsen and his engineer (App. p. 523).

Holland stayed on board the boat while making the repairs agreed upon, and was assisted by an oiler who was hired by Nielsen. The boat remained at Tarrytown until the ice in which it was imprisoned was broken up. Then it proceeded to the Hildebrant Shipyard where it remained until sometime in April when the repairs were finished. Altogether Holland was on board the boat for some two months making these repairs. When the work was completed Nielsen told Holland that he wanted his engineer to test the boat before paying Holland (App. p. 525). At Nielsen's suggestion Holland rode on the boat to Tarrytown, New York, where he left it. He then proceeded to New York where he waited for several days, (App. p. 527). During this interval he attempted to contact Nielsen from day to day, at the Economy Oil Company office, but was told that Nielsen was out of town.

At about 7:30 P. M. on April 25, 1936, Nielsen called Holland at his rooming house in New York and told him that the ship was at Bayway, and that they were having trouble with the engines and that he wanted Holland to look at them. Nielsen thereupon drove him to Bayway where the ship was docked. Boarding the ship Holland found that the compressor was not working, so he changed

into overalls which he found on board, and made the necessary repairs. This took about fifteen minutes. Thereupon Nielsen, who was still present, said that the steering cable had become chafed and needed replacement.

After some discussion Nielsen left for New York, where he was to obtain a new cable, instructing Holland to await his return so that Holland could install the cable that night. Nielsen also told Holland that he would pay him off when he returned and would drive him back to New York. Holland agreed and Nielsen left. Thereupon Holland in company with Captain Larkey, who was still aboard the boat although his services had been terminated, left the boat and went to a saloon to spend the time until Nielsen should return.

At about 12:30 A. M. they returned to the dock in a taxi cab. Getting out of the cab they were met by Inspector Robsky and the other agents who had seized the ship and were immediately placed under arrest.

Most of the detail narrated above was supplied by the defendant himself. The government proved only the circumstances of Holland's arrest when he returned to the dock at Bayway at 12:30. They proved also, through the witness Raymond Larkey, that Holland had boarded the Leffler at Tarrytown for the purpose of making repairs; that Larkey, who was engineer of the boat at the time, instructed Holland as to the repairs to be made (App. p. 162). Holland says he received no such instructions from Larkey, but that Larkey merely came on board the boat to get some tools which he had left.

The foregoing is all the proof relating to Holland in this case and none of it was contradicted by any evidence offered by the government. There is no proof of any conspiracy, or agreement between Holland and any one else named in the indictment. There is no proof that he ever met any of the other defendants, with the exception of Larkey, who was captain of the Leffler. Nielsen, with whom Holland had his dealings, was not tried as a de-

fendant. The indictment did include this name as an alias, alleged to have been used by the defendant Gerke, but this was stricken from the indictment on the court's motion. Holland described Nielsen and testified Gerke was not the person who had engaged him and that he had never met Gerke. Nielsen was identified by others as the defendant William Josephs, who died before trial.

The undisputed facts therefore indicate that Holland was a legitimate business man engaged in business as a marine engineer and repair man; that he was hired as an independent contractor to make certain specific repairs to the Leffler's engines; that he made those repairs; that he had no other connection with the boat; or with its operation or with any of the defendants in this case. In all of this there is nothing from which any inference of guilt or guilty knowledge can be drawn, nor was there any evidence warranting the submission of this testimony to the jury.

There was an utter absence of proof, nor was it attempted to be proved, that Holland had anything to do with unloading alcohol from the Hillfern to the Leffler—although this is charged against Holland in one of the overt acts in the third count of the indictment. As a matter of fact this particular overt act, although a vital link in the chain of evidence necessary to prove the conspiracy, was not substantiated by any proof in the entire case. There is no suggestion that Holland was on the Leffler on the high seas, or at any point except Tarrytown and at the shipyard on the Hudson River. We submit therefore that there was no evidence connecting Holland with the conspiracy charged in the third count and that the motion for a directed verdict on this count should have been granted.

Insofar as the first and second counts are concerned, there is no evidence that Holland knew or had reason to believe that the Leffler carried alcohol on the night of April 25th. He was not on board the boat for several days prior to that night. His presence at Bayway was

wholly concerned with his job of repairing the engines. The testimony viewed in its most favorable light toward this defendant was wholly consistent with his innocence and does not support any inference of guilt.

In the case of *U. S.* vs. *Falcone*, 109 Fed. 2d 579, affirmed by the U. S. Supreme Court in 61 Sup. Ct. 204, some thirty-four people were indicted for conspiring to illicitly manufacture alcohol. Among the defendants were five or six who dealt in sugar which was supplied to the bootleg manufacturers. Falcone sold sugar to distributors, who in turn sold to the distillers. Alberico and Nole sold to the distillers, one selling yeast and the other sugar. The jury convicted all. The Circuit Court of Appeals reversed the decision in an opinion by Judge Learned Hand, who held that the seller of goods does not become a conspirator or abettor merely because he does not refrain from selling goods which he knows the buyers intend to use in committing a crime, but that he must in some sense promote their venture himself, make it his own or have a stake in its outcome, before he is guilty as a conspirator or abettor. There was definite knowledge on the part of the dealers in sugar that the products were being used in the illicit production of alcohol, and there was also the fact that one of the dealers used an assumed name. The court held:

> "The wholesaler and distributor who supply sugar, yeast and cans of which alcohol was illicitly distilled, or in which it was sold, were not guilty of conspiring with the buyers to operate illicit stills, even if they knew of the illegal use to which the products were being put, notwithstanding that the distributor of the yeast operated under a certificate taken out for him by a cousin who swore falsely that he was to do the business".

The facts in the above case are far more capable of a construction of guilt than those at bar, for here there is no evidence that Holland knew or had reason to believe that

the boat was to be used in an illicit venture, or that it carried alcohol on the night of April 25th. The mere fact that Holland made repairs to this boat, which was later used for unlawful purposes, cannot render him liable as a participant, or as an aider or abettor of the crime. Under the *Falcone* case even if he had reason to suspect, or knew the use to which the boat would be put, he could not be held liable. However, there is no evidence whatsoever from which such guilty knowledge on Holland's part can be inferred.

In *U. S.* vs. *Staffenbach*, 61 Fed. 2d 955, the defendant leased a building in which a still was thereafter located. The defendant lived right down the street and visited the premises from time to time. The court held that, unless it was shown that he had an interest in what the operators of the still were doing, the mere fact that he had known of their activity was not enough to make him liable as a conspirator.

In the case of *U. S.* vs. *Devito*, 68 Fed. 2d 837, where the defendant was caught at the still, the court held that there was not enough evidence to convict him unless the government brought home that he was a party to the conspiracy, or had a stake in it.

And in *U. S.* vs. *Dellaro*, 99 Fed. 2d 781, Judge Learned Hand held, that in order to render one liable as a conspirator it must be shown that he affirmatively unites himself with the venture, or agrees to take some part in it.

The situation at bar is no different from that of a mechanic or garage man, who is hired to make repairs on an automobile which, without his knowledge, (or even with his knowledge under the *Falcone* case), is used by its owner in a hold-up or for other unlawful purposes. Certainly the garage man is not an accomplice of the owner in the unlawful enterprise, nor can he be classed as an abettor of the crime.

In every crime innocent persons may in some manner come into contact with the criminal, and apparently aid or

assist him. The taxi cab driver who innocently drives the hold-up man to or from the scene of his crime, the messenger who unwittingly receives a ransom note and delivers it without knowing its contents, the merchant who innocently receives and passes counterfeit bills—do not thereby become parties to the particular crime involved, nor can any guilt be imputed to them. They are not aiders or abettors, notwithstanding that they may in some degree aid and assist the criminal.

It is certain that no substantive crime could have been spelled out against Holland from the evidence in this case. There is no proof that he committed any crime, but he is included as a defendant merely through the convenient use of a conspiracy indictment and by the simple means of charging that he "conspired and agreed" with the others—a charge wholly unsubstantiated by the evidence. The conspiracy indictment was never intended as a catch-all in which to ensnare the innocent as well as the guilty, merely because the net of circumstance chances to touch with its fringes a person otherwise innocent. We call attention to the language of Judge Hand in the *Falcone* case:

> "It is not enough that he does not forego a normal lawful activity of the fruits of which he knows that others will make unlawful use. He must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when so many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatsoever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such comprehensive indictments that they can be avoided. We may agree that morally the defendants at bar should have refused to sell to illicit distillers, but both morally and legally to do so toto coelo, differ from joining with them in running the stills".

It is a wholly unwarranted extension of the conspiracy doctrine to imply guilt to one who performs services or makes repairs to a boat, an automobile or any other instrumentality, which may later be used as the means of a criminal act, or to charge him thereby with being a party to the crime. Under the evidence in this case there is nothing from which any inference can be drawn that Holland had associated himself with this venture, that he had become a party to it, or that he had a stake in it. There is no evidence that he had any guilty knowledge, or even suspected the criminal activities to which the Leffler was being put.

We submit that the situation with respect to Holland is no different in theory from that which existed as to the defendants Watson and Robin, whose convictions were reversed by the Circuit Court of Appeals and that in all logic, a reversal as to them should likewise be reason for the acquittal of Holland.

It was the government's burden to prove the allegations charged against Holland in this indictment, and to substantiate his guilt beyond a reasonable doubt and to the exclusion of every hypothesis consistent with innocence. This it failed to do, and the court should have directed a verdict of acquittal in his behalf, both at the end of the government's case and at the conclusion of the entire testimony, and we submit that the court's refusal to do so was error.

POINT V.

The Court erred in refusing to direct a verdict of acquittal as to the defendant Wade.

Wade, a person of limited education, was formerly a real estate salesman and thereafter a seaman. Sometime in the Fall of 1935, while he was in the Seamen's Institute in New York, looking for a job, he was approached by a

man who called himself Nielsen. Nielsen told Wade that he was opening up an oil business and was going to buy an oil tanker to transport oil up and down the coast, and offered Wade a job, which he accepted. At Nielsen's instruction Wade rented an office in New York City under the name of Economy Oil & Transportation Company. Also at Nielsen's direction Wade engaged an attorney, Murray Zazella, in whose father's office Wade had once worked, to draw incorporation papers for the company. These papers were drawn and filed, Wade appearing as president, and Nielsen not entering the picture. Payment was made with moneys furnished by Nielsen (App. p. 482). Wade was assigned duties purchasing supplies and pricing equipment for the ship which Nielsen said he was buying, and also took care of the office, for which he was paid $25.00 a week.

In November, at Nielsen's request, Wade went to Wilmington to enroll the Charles D. Leffler, which had been bought by the Economy Oil Company (Exhibit G-10). Wade signed the enrollment certificate as president of the company (App. p. 483).

In April, 1936, Wade was introduced to a Mr. Ferber by Nielsen, and was told to accompany Ferber to the offices of the Balfour Guthrie Company, owners of the premises at Bayway (App. p. 484). Arriving there, he was told by Ferber to sign a lease, which had been prepared beforehand through negotiations between Ferber and the owners, and was also told to use the name of "M. J. Slavin" when signing it. Wade thereupon signed the lease (Exhibit G-20) in the name of "Morris J. Slavin, trading as Criterion Oil Company". Wade never saw the Leffler (App. p. 485), was never on the premises at Bayway and did not know that the Leffler was being used to transport alcohol (App. p. 487). He had no knowledge of the company's business, except that he believed that it was engaged in the oil trade. He seems to have followed orders and was unquestionably used as a dupe by Nielsen and Ferber. He read of the

Leffler's seizure in the newspapers. Thereafter he tried to contact Nielsen for three or four days, but Nielsen failed to make any appearance and Wade had no idea how to reach him. Concluding that he was out of a job Wade left and for the next four years worked on various ships, principally operating on the west coast. In 1940 he learned through a friend that he was wanted for questioning in connection with the Leffler. He voluntarily reported to the nearest police station and told them who he was. Thereafter he was brought back to New Jersey.

We do not condone or attempt to excuse Wade's blind obedience to orders in signing the lease for the Bayway property in the name of "M. J. Slavin", when ordered to do so by his superiors, Nielsen and Ferber. But he is not on trial for signing a false name to the lease. Perhaps a person of more extensive education and experience would have refused such an order, and questioned his employer's reasons. But Wade was not such a person. Nielsen and Ferber had chosen their dupe wisely. They offered him a steady job, held out hopes of advancement and greater remuneration, clothed him with the title of "president" and with apparent, if no actual, authority, and flattered him by requiring his signature as president on various documents and much correspondence.

But there Wade's connection with the corporation and with this case ended. Outside of his duties in the office Wade did nothing, was entrusted with nothing, and knew nothing concerning the corporation's actual activities. Nielsen alone arranged for the purchase of the Leffler, supervised its repairs, hired its crew and directed its course. Ferber, acting with Nielsen, alone negotiated the lease at Bayway. Nielsen was on the Leffler at Bayway and in charge of it on the night that it was seized. There is no evidence that Wade in any manner knew, or had reason to suspect that the Leffler was engaged in carrying alcohol on that night. There is no evidence that he knew or met any of the defendants in this case who were on

trial. The evidence is undisputed that he was never on the Leffler and never saw it; that he was never at Bayway, or at any other place where the conspiracy is alleged to have been executed.

The very nature of the evidence indicated that Wade was chosen by Nielsen and Ferber because he was the sort of person whom they could keep in the dark, while using him for their own purposes. It is clear from the evidence that Wade never was taken into their confidence, and that he did not know their real business. Certainly, the evidence falls far short of indicating in any degree that he conspired and agreed with Nielsen, or with anyone else, to do the acts charged in the indictment. He was not a party to any conspiracy but rather the innocent pawn of the real culprits.

In our argument in behalf of the other defendants herein, we have referred to the ruling in *U. S.* vs. *Falcone, supra,* in which it was held that one supplying merchandise to others for use in illicitly manufacturing alcohol is not guilty with the main offenders and is not a conspirator, notwithstanding his knowledge of the use to which the merchandise is to be put. We have also referred to the authorities holding that mere presence at places where a crime has been committed, and mere association with persons engaged in an illicit venture, does not render a person guilty as an accomplice or conspirator in the absence of proof that he was part of the conspiracy, or a party to the corrupt agreement, and an active participant in promoting the venture and making it his own.

We think these cases pertinent to Wade's connection with this case. He was in one sense merely a bystander to Nielsen's and Ferber's acts. He possessed no guilty knowledge of their purpose and the evidence discloses none. He did nothing to promote this venture for his own ends, nor did he have any stake in its outcome. In particular, he is not shown to have done any act in connection with the importation of the alcohol on the Leffler on the night of April

25, 1936. His signing the lease for the Bayway property can give rise to no inference that he participated in the actual importation of alcohol on this particular night. He had no reason to believe, when he signed the lease, that the premises would be used for an unlawful purpose. He is not shown to have had any knowledge that alcohol was aboard the Leffler on this night, nor did he participate in any manner with its importation.

It must be remembered that a conspiracy to commit an offense, and the substantive offense itself, are wholly different crimes. (*U. S.* vs. *Hallbrook,* 36 Fed. Supp. 345.) The first and second counts of this indictment charge a definite substantive offense—that of unlawfully importing alcohol into the United States, on board the Leffler, on April 25, 1936, at Elizabeth. Only the evidence pertaining to that particular incident, can apply to these counts. We submit that it was not shown, nor was it even pretended, that Wade had anything to do with the bringing in of the Leffler on the date in question. He was not at Elizabeth, he was not on the Leffler, then or at any other time, his whereabouts on the particular date pleaded were not shown, and he did nothing which can in anywise be construed as a participation in the specific crime charged.

In the absence of direct participation, (and this the government did not even contend), it was incumbent upon the government to prove that Wade by some act or acts, aided and abetted the importation of this alcohol, on this boat, at this place, and on this date. Such proof is entirely absent. The mere fact that he was President of the corporation which owned the boat is not sufficient to prove knowledge, participation, or criminal intent.

As was stated in *U. S.* vs. *Sall,* (C. C. A. N. J.) 116 Fed. 2nd 745, it is insufficient for the government to show merely that Wade was a member of a conspiracy to unlawfully introduce this alcohol, and that in the course of such conspiracy, this substantive crime was committed by other members of the conspiracy. Even if so much were shown

from the proofs, it would not be sufficient. The burden was upon the government to prove the actual commission of the offense pleaded by Wade, or to prove him an aider and abetter of the particular offense.

Not only does the proof fail to sustain this burden, but it does not exclude every reasonable hypothesis of innocence. Wade obviously and clearly knew nothing concerning the real activities of Nielsen and Ferber, or Levine. Nowhere is there any proof in the case tending to establish that he, either alone or with others, imported alcohol on the Leffler at Elizabeth on April 25th, 1936. We submit that a verdict of acquittal should have been directed on the first and second counts, in his favor.

As to the third count which charges a conspiracy, there is even less proof so far as Wade is concerned. There is an utter lack of evidence that Wade had anything to do with the Hillfern, the Reo 1st, the Anna D., the Augusta and Raymond, although a connection with all of these boats is charged against him. He is not shown to have met or known any of the defendants, except Nielsen and Ferber, who were not tried, yet he is charged with having conspired with them. Neither is it shown that he in any manner aided or assisted the defendants in the various acts charged in the indictment. There is no proof that he knew or had reason to believe that the Leffler had taken on a cargo of alcohol and proceeded to Bayway, or that it was intended by his superiors to use the Leffler for illicit purposes.

All that is shown is that he acted as the dupe of the real culprits,—that he appeared as "President" of Economy Oil, although actually acted more as an office boy, and that he signed a lease for certain premises. That mere fact in no way can be classed as aiding or abetting, for it might well be that the lease, so far as Wade was concerned, was for legitimate purposes. No guilty knowledge is shown on his part.

Wade should not be convicted merely because he happened to have been used, by those who were the real culprits, to further their purposes, in the absence of any testimony that he had become a part of their conspiracy, or that he adopted it as his own. Wade had no more to do with this case than a stenographer in the office. He knew no more of what was going on, and his acts are entirely consistent with innocence. When he learned that he was wanted for questioning, he voluntarily surrendered, and told his full connection with the case, including his use of the assumed name Slavin. This certainly does not indicate that he acted with any criminal intent or guilty knowledge, but rather that he had full faith in the innocence of his acts.

We respectfully submit that the court erred in refusing to direct a verdict of acquittal in his behalf, and pray that the judgment against him may be reversed and set aside.

POINT VI.

The Court erred in refusing to direct a verdict of acquittal in behalf of the defendant Charles Larkey.

The defendant Charles Larkey is a licensed master and pilot of steam vessels, and has worked on various ships, principally in and around New York Harbor (App. p. 493).

He testified that he was hired as master of the Leffler in November, 1935, by Mr. Nielsen, in Baltimore, after having been told about the job by his brother, Raymond Larkey. After he was hired and upon Nielsen's orders he filed the ship's papers at the Port of Wilmington, and took the necessary oath as master of the Leffler (Exhibit G-17). He remained on the ship at Baltimore while it was being repaired.

The government in support of the charges against Larkey proved only the foregoing, plus the circumstances of Larkey's arrest at Bayway on the night of April 25,

1936. Larkey was not aboard the boat at the time of its seizure, but was arrested with the defendant Holland as they both got out of a taxicab on the street in front of the dock at Bayway at 12:30 A. M., some hours after the seizure of the Leffler. This was the entire testimony for the government.

In his defense Larkey testified that when he was first engaged the Leffler was undergoing repairs at a shipyard in Baltimore (App. p. 494). In the middle of November he received orders from someone who called the shipyard, to proceed to New York (App. p. 495). On the way to New York, and while in Chesapeake Bay, the boat encountered a gale which necessitated its putting in at Cape Charles. There the boat was tied up to a coal dock, where it remained for two or three days until the gale had spent its force. During the storm and while riding at the dock, the boat was damaged (App. p. 495). Thereafter the boat proceeded to the Hildebrant Shipyard, on the Hudson River at Rondout, New York, where it underwent repairs until sometime in December. The Leffler then was returned to the Port of Wilmington to have its repairs inspected by the port authorities (App. p. 496). The inspectors made a list of repairs which they required to be made. These were made at the Hildebrant yard and the boat again returned to Wilmington. Again the inspectors failed to pass the ship but ordered a new compressor and light plant to be installed. Larkey set out for Hildebrant's a third time, around the end of December, 1935. On this trip, ice formed in Delaware Bay and the ship was badly damaged and partly sunk. Temporary repairs were made at a shipyard on the Maurice River in New Jersey, and the ship proceeded toward Hildebrant's. Arriving off Tarrytown, New York, the vessel encountered a violent snow storm and Larkey put the boat into shore. Before he could proceed, ice formed and the boat was frozen in. This was in January, 1936.

Larkey then notified the Economy Oil Company that he was leaving the boat to get another job. They told him to go ahead and that they would notify him when they would need him again (App. p. 498).

On or about April 1st, he received a message from his employers to take the boat from Tarrytown to Hildebrant's, which he did (App. p. 499). In the latter part of April he received another call to join the boat at Hildebrant's. There he met Nielsen (App. p. 500), who told him to take the boat to Wilmington, and when he arrived there, to call Nielsen, who would give him further orders.

Arriving at Wilmington he tied up at the city dock and called Nielsen as directed. He was unable, however, to reach Nielsen or anyone at the offices of the Economy Oil. Not knowing what to do, he went ashore and visited a saloon, where he proceeded to get drunk. He remained away from the boat all of that night and most of the following day. Upon his return he found a man named Gray in charge of the boat. Gray informed him that Nielsen had looked for him all of the past night, and not being able to find him had hired Gray as master of the boat. He also handed Larkey a telegram notifying Larkey that his services as master were terminated, and that if he would report to New York he would be paid off. Larkey noticed that the boat had changed its position during the night, and whereas it had been empty when it reached Wilmington, it was now apparently loaded with some cargo.

Having no way to get to New York, Larkey asked and received the new master's permission to ride to Elizabeth, to which port Gray informed him the boat was proceeding. Arriving in Elizabeth, Nielsen came aboard the boat and shortly afterward left for New York to get a mechanic to repair the ship's engines, which had been causing considerable trouble. An hour or two later, Nielsen returned with the defendant Holland, who came on board and repaired the ship's engine. Nielsen again left for New York with the captain, Gray, stating that he was going to obtain

a new steering cable and asking that Holland and Larkey await his return so that Holland could install the new cable, after which he would drive Holland and Larkey to New York and pay them off.

When Nielsen left, Larkey and Holland also left and went to a saloon to while away the time until Nielsen should return. At about 12:30 A. M. they returned to the Leffler in a taxicab. As they alighted from the cab, and while still upon the street, they were arrested by the inspectors, who had in the meantime seized the Leffler.

The defendant Larkey identified the defendant William Josephs, whom he had met in court at the time of pleading in this case, as being the same person who called himself Nielsen.

Summarizing this testimony, there is no proof from which Larkey's guilt can be inferred as to any of the counts in this indictment.

Insofar as the seizure of the Leffler is concerned, the government's testimony did not prove that Larkey had any knowledge or reason to believe that the Leffler contained alcohol on this particular night, nor was he shown to have participated in any manner with its illegal importation. All that appears on the government's case is that Larkey was present near the dock where the boat was tied some hours after its seizure. His mere presence there is not sufficient evidence from which it can be inferred that he actively committed the crime of importing this alcohol unlawfully. The government did not prove that he had anything to do with the operation of the Leffler on the day in question.

In his defense Larkey fully explained his reason for being present on the night in question, an explanation which was wholly consistent with his innocence and which was unrebutted by the government. There is no proof that the Leffler took on any alcohol from any source prior to its seizure, nor can any inference be drawn that Larkey actively engaged in bringing the boat into Bayway with

alsochol upon it, merely from the fact that he was in the vicinity after the boat docked.

It was the government's burden to prove the allegations of the first and second counts, beyond any reasonable doubt. This they did not do.

As to the conspiracy count it clearly appears that Larkey acted only as an employee of the owners of the Leffler to do certain specific jobs, none of which had any relation to the illegal activities charged in the indictment. He was hired to captain the boat from Baltimore to Rondout on the Hudson River, and again between that point and Wilmington, while the boat was undergoing repairs. His duties were only to ferry the boat from the shipyard, where the repairs were made, to the port where it had to be inspected by the steamship inspectors. In this there was nothing illegal or improper, nor did anything occur during this period which would have led Larkey to suspect wrong doing on the part of his employers. No part of his conspiracy is alleged to have been committed, insofar as the Leffler is concerned, during the period that Larkey was acting as its captain.

Later, he was again employed to take the boat from Rondout to Wilmington, which he did. There is no proof whatsoever of any act of an illegal nature being committed during this trip. In Wilmington he left the boat and was subsequently fired. He came back to Bayway on the Leffler, not as its captain but as a passenger, and this is not controverted. If alcohol was taken on board the Leffler it must have been taken in the interim that Larkey was away from the ship. There is no proof that anything of an illegal nature was performed or committed while he was the Leffler's master, nor did anything occur on the boat which would have led him to believe that the boat carried alcohol.

Insofar as the remaining allegations in the conspiracy indictment are concerned Larkey is not shown to have had any connection therewith. Thus there is no evidence tying

him up with the Hillfern, the Reo 1st, or any of the other boats, or with any of the activities in which those boats are alleged to have been engaged. There is no proof of any agreement or conspiracy on his part with the remaining defendants. On the contrary, the evidence is clear that he acted solely as an employee, hired by Nielsen to do legitimate acts and having no knowledge or reason to know of Nielsen's illegal activities. As an employee there was no reason why his employers should have taken him into their confidence and it is not shown that they did.

We respectfully submit that the allegations of the indictment charged against Larkey were not proved and that the government did not sustain its burden of establishing Larkey's guilt of these crimes, beyond a reasonable doubt. For the reasons submitted we respectfully urge that the judgment of conviction against him be reversed and set aside.

POINT VII.

The Court erred in refusing to direct a verdict of acquittal in behalf of the defendant James T. Brown.

The defendant Brown is a seaman, having formerly served as chief machinist's mate in the United States Navy, and presently being engaged in work for the United States Army, at Fort Hancock, New Jersey.

The testimony against Brown in this case is related to several distinct occurrences, each separated from the other in point of time and in the nature of the evidence involved.

For instance, the witness Cunningham testified that he saw Brown on two occasions, once in January 1935 when the Boat Reo, under the command of Stanley Collins, was piloted up the Raritan River, in New Jersey, by Brown who, as Cunningham says, joined the boat at the mouth of the river. Again Cunningham says that he saw Brown at a point on the high seas off New York in May 1935, while

Cunningham was aboard the Augusta and Raymond, also under the command of Collins. At this time Cunningham says that Brown approached the Augusta and Raymond in a small contact boat.

In addition to the foregoing there was testimony that Brown was aboard the Charles D. Leffler in Baltimore, during the period around October and November 1935, and that he was supervising some of the repairs being made to that ship at the time.

In his defense Brown denied Cunningham's testimony *in toto*. He admitted having performed work on the Leffler, at Baltimore, testifying that he was engaged through the Capital Marine Company of New York to install a muffler and generating plant which the Capital Marine Company had sold to a Mr. Ferber. Brown took this job and went to Baltimore to install the plant on board the Leffler. He was engaged in this work for about three weeks and was paid by Mr. Ferber.

Brown further testified that during the course of this work at Baltimore he lost his wallet, which contained only an expired driver's license. This wallet was later found among the ship's papers when the Leffler was seized in April 1936.

Brown is charged under all three counts of the indictment. It will be noted that the testimony against Brown relates solely to the periods of January 1935, May 1935 and November 1935. After November he is not shown to have had any further connection with this case.

The charge laid in the first and second counts of the indictment, relating to the unlawful importation of alcohol on board the Leffler at Bayway, is specifically restricted to April 25, 1936. No witness and no proof placed Brown at or near the Leffler on that date. He is not shown to have had any connection with this boat, or with its operation, after November 1935. The crime charged in the first and second counts occurred months after this time, at a

place entirely apart from where Brown had worked on the Leffler.

The sole testimony on which Brown was held under these counts of the indictment, is that his wallet, containing an expired driver's license, was found aboard the Leffler after its seizure. We submit that that in itself is not sufficient proof on which to base any inference that Brown was aboard the vessel on the date charged in the indictment, much less that he actively participated in the commission of the crime alleged. It is well settled that an inference cannot be based upon an inference. Yet to hold Brown guilty under these counts it must necessarily be inferred that because his wallet was found on board this boat, he himself must have been on the boat. That since he was on the boat at some time or other it can be inferred that he was on board the boat on the particular date charged in the indictment. That having been on board on that date, it can be inferred that he was there for an unlawful purpose and that he actively participated in committing the crime charged against him. The vice of such reasoning is apparent. This wallet may have found its way to the Leffler through any number of innocent reasons. He may have lost it anywhere, and it may have been found by a member of the Leffler's crew. It may have been stolen from him and found its way to the Leffler. He may have left it on board years prior to this date, or he may have lost or mislaid it while he was on the Leffler for perfectly legitimate reasons. The mere fact that it was there, permits no inference of guilt. In his defense Brown told how the wallet did get there, and his testimony, which is uncontradicted, is entirely consistent with innocence. We submit that this one fact alone did not constitute sufficient evidence on which to base any inference that Brown imported alcohol on board the Leffler at Bayway, on the night of April 25, 1936, and we submit that a verdict of acquittal should have been directed in his

behalf. The government wholly failed to sustain the burden of proving him guilty under the first and second counts of the indictment.

As to the conspiracy count, the evidence at most discloses that Brown may have been guilty of isolated substantive offenses, for which he is not on trial, although we submit that even that much does not appear from a fair analysis of the evidence. The sole testimony which might be construed to be of an incriminating nature, is that Brown piloted the Reo 1st up the Raritan River in January 1935. The testimony that he met the Augusta and Raymond in a contact boat, on the high seas off New York, does not in itself indicate anything of an illegal or criminal nature. The occurrence testified to, took place on the high seas, where the possession of alcohol was not illegal. There is no proof that Brown brought any alcohol into the United States at that time, or that any one else did, so that neither as a principal nor as an abetter can it be inferred that Brown, at that point, was engaged in any criminal act. While again we may conjecture and surmise as to what was happening, there is no proof from which any fair *legal* inference can be drawn.

The evidence as to Brown's making repairs to the Leffler in Baltimore, which we have already referred to, does not indicate anything of an illegal or criminal nature, and there is no proof that any part of the conspiracy, or any illegal acts, were committed by any of the defendants in connection with the Leffler, during that period.

Summarizing the testimony against Brown therefore, while it might possibly be concluded that Brown was engaged in illegal activities at the Raritan River, if we believe the testimony of Cunningham, he is not charged here with that act, but rather with being a member of a general conspiracy, extending over many months time, whose ramifications are alleged to have spanned two continents, and to have embraced within its compass countless persons.

From what evidence can it be inferred that Brown was any part of any such a conspiracy? In the first place no conspiracy such as is alleged in the indictment, was proved to exist, as we have heretofore argued. Second, it is certainly not proved that Brown was a party to any such conspiracy, or that he conspired or agreed with anyone to do the acts complained of. He did work for Ferber, in Baltimore, although he was not engaged directly by Ferber. Apart from this activity, and after this period of time, he is not shown to have had any further connection with the Leffler. At other times, if we believe Cunningham's testimony, and in an entirely unrelated manner, he came into contact with the defendant Collins. These are entirely distinct matters, involving different dates, different persons, and different facts. No connection between the two is shown. Yet solely because he did come into association with Collins and with Ferber, notwithstanding that he did so at places miles apart, and at times months separated, he is charged with having conspired with both of these persons, and with many others, to engage in a conspiracy whose scope was far beyond any act or acts which Brown committed.

We have heretofore cited cases that a conspiracy to commit a crime, and the substantive crime itself, are distinct and separate offenses. We have also cited authorities holding that where a particular conspiracy is charged, proof of different and unrelated conspiracies is not sufficient to warrant a conviction.

We urge in all earnestness that the proof under this count of the indictment does not spell out any conspiracy or agreement between Brown and the remaining defendants, to commit the acts charged in this indictment, nor is the evidence sufficient to warrant any inference that Brown conspired and agreed with the others to do these acts. Regardless of his possible guilt of other substantive crimes, which are not here involved, he is not shown to have been

a member of the conspiracy which is pleaded in this indictment, nor is it shown that the acts which he committed were done with knowledge of any such conspiracy, or in execution of it. Whatever he did, he clearly appears to have done on his own.

We respectfully urge therefore that a verdict of acquittal should have been directed in his favor, and we submit that the judgment against him should be reversed and set aside.

CONCLUSION.

For the various reasons assigned, we respectfully pray that a writ of certiorari be issued to review the judgment of the Circuit Court of Appeals for the Third Circuit.

Respectfully submitted,

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